Supreme Court, U.S.
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No. 96-931

In The

Supreme Court of the United States

October Term, 1996

GRANTWOOD VILLAGE,

Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, GRANT'S FARM MANOR, INC., and GATEWAY TRAILNET, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT GATEWAY TRAILNET'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The issue is not, as stated by Petitioner, whether federal regulatory authority preempts state property law as to the abandonment of a railroad's real property interest in a right-of-way, but whether it preempts a landowner's right to recover exclusive use of his property while the Surface Transportation Board (formerly ICC) retains jurisdiction under federal law. The proper question has been authoritatively answered in the affirmative by this Court.

STATEMENT PURSUANT TO RULE 29.6

Respondent Gateway Trailnet, Inc. is neither a parent or subsidiary of any other corporation.

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STATEMENT OF THE CASE

The letter from President Grant to his St. Louis agent, dated April 6, 1872, (not 1874 as stated on page 2 of the Petition for Writ of Certiorari) is set forth in full in the Appendix to this brief.[1] The permission granted in the letter to the railroad for a right-of-way across President Grant's farm in St. Louis County, Missouri, and the railroad's subsequent building of its track pursuant to such permission, gave the railroad an easement under Missouri law. *Maupin v. Chicago R.I.&P. Ry. Co.*, 71 S.W. 334 (Mo. 1890); *Allee v. Kirk*, 602 S.W. 2d 922, 925 (Mo. App. 1980).[2] All issues in this case stem from the fact that the Railroad had only an easement in the right-of-way. Had the railroad owned the fee title to the right-of-way, this case would have never arisen.

The railroad is no longer using the easement. Instead, Gateway Trailnet, Inc. is presently operating a hiking/biking trail on the right-of-way pursuant to a Notice of Interim Trail Use (NITU) issued by the Interstate Commerce Commission (ICC) on March 25, 1992 (App. 33-34). The ICC issued the NITU pursuant to what Petitioner calls the "Rails-to-Trails Statute," 16 U.S.C. § 1247(d). That statute provides that interim trail use

> shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

By such language, the provision expressly preempts state law

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1. A photocopy of the letter is found in the record at App. 229 and is correctly transcribed at App. 212 and in the Appendix.

2. Since the railroad used the right-of-way for almost 120 years, even if President Grant had not consented, the railroad would by 1992 have had an easement by prescription, *i.e.*, by adverse possession.

to the extent that a railroad's easement interest in a right-of-way would otherwise "revert" to the underlying fee owners upon the railroad's abandonment. The interim use preserves the right-of-way for future railroad use when needed, as now determined by the Surface Transportation Board, successor to the ICC.[3] In the statutory scheme of Title 49 U.S.C. § 10903, which is the basic governing statute[4], the railroad is considered to have discontinued operations rather than abandoned the right-of-way. *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 8 (1990).

In 1993, Petitioner filed its lawsuit in state court (Missouri). The state case was originally filed against only the Missouri Pacific Railroad. On January 17, 1994, Gateway Trailnet was served with a Summons and a First Amended Petition joining Gateway Trailnet as a defendant (Supp. App. 08). That First Amended Petition alleged that the Railroad had filed with the Interstate Commerce Commission (ICC) a notice dated February 10, 1992, stating its intention to abandon the right-of-way[5] and that the Petitioner as the fee owner was therefore the owner "by reversion" despite the transfer of the right-of-way by Missouri Pacific to Gateway Trailnet. Petitioner clearly raised the issue of abandonment in the state court.

Gateway Trailnet filed a timely notice of removal (App.

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3. *See* ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803, 823.

4. Petitioner did not include this key statute in its Appendix. We have therefore included it in ours.

5. The system followed under the Rails-to-Trails statute is typically that after the railroad files its notice with the ICC (now Surface Transportation Board) the prospective trails organization files its application for an order or notice authorizing interim trail use. *See* opinion of the Eighth Circuit appended to the Petition for Writ of Certiorari, at p. 3a.

13; Supp. App. 1) in the District Court for the Eastern District of Missouri. The notice cites both the federal law which controls and preempts the abandonment of railroad rights-of-way and the "Rails-to-Trails" statute 16 U.S.C. § 1247(d) under which Gateway Trailnet had been afforded the right of interim trail use.

In the District Court the Petitioner made the same contention it is making here that "under state law, whatever interest MoPac had in the property had been abandoned before the 1992 ICC proceeding" (p. 2 of Petition for Writ), and that therefore MoPac had nothing to hand over to Gateway Trailnet. The District Court overruled Petitioner's motion for remand and granted summary judgment dismissing Petitioner's cause. The Court of Appeals for the Eighth Circuit affirmed. The orders and opinions below are contained in the appendix to the Petition for Writ.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED BY PETITIONER IS MISCONCEIVED; THE PROPER QUESTION HAS ALREADY BEEN AUTHORITATIVELY *ANSWERED BY THIS COURT.*

The extremely broad "question presented" by Petitioner, *i.e.*, whether the federal regulatory scheme affecting railroad rights-of-way preempts state property law (*see* p.1 of Petition for Writ) is not one on which the opinion of the Eighth Circuit is in conflict with any other circuit. The Supreme Court has in *Preseault v. Interstate Commerce Commission, supra*, already resolved the key issue of federal/state authority as to rights-of-way subject to Rails-to-Trails orders of the ICC. The proper question of whether federal law preempts landowners' attempts

to reassert their rights because trains are no longer running was authoritatively answered in that case.

In *Preseault*, the Supreme Court put its seal of approval on the "Rails to Trails Statute." The decision was unanimous, with three justices filing a concurring opinion. The Court referred the plaintiffs to the Court of Federal Claims for redress based on their state law property rights as affected by the federal regulatory authority which Congress had authorized and the Court upheld.[6] The plaintiffs then appealed to the Court of Federal Claims, which denied their claim on various grounds. On appeal, the Federal Circuit reversed and held that the claim for damages should be allowed against the United States, remanding the case to the Court of Federal Claims for determination of just compensation. *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996).

Nothing in any of the *Preseault* litigation is in conflict with what the Eighth Circuit held in this case. The Eighth Circuit opinion was guided and informed by the Supreme Court's opinion in *Preseault*, which in fact followed the reasoning of the Eighth Circuit's previous decision in *Glosemeyer v. Missouri-Kansas-Texas Railroad*, 879 F.2d 316 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1295 (1990). The Eighth Circuit holding in

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6 Three of the nine justices who had joined in the unanimous opinion (O'Connor, Scalia and Kennedy) filed a separate, concurring opinion written by Justice O'Connor. The purpose of the opinion was to quarrel with the reasoning of the Second Circuit that, no matter what Vermont law might provide, the ICC's actions prevented assertion of the landowner's reversionary interest. The concurring opinion is based on (1) the proposition that state law must control property rights and (2) the logic that if there is no reversionary right under state law the court's long discussion of the Tucker Act is unnecessary. The result seen by the concurring justices is that federal preemption may delay the property owner's enjoyment of their interests, but does not affect their "vesting," and leaves them with a claim that the continuing trail use is a compensable taking.

this case is also consistent with the recent decision of the Federal Circuit in *Preseault, supra.*

The Eighth Circuit did not hold what Petitioner says it did, *i.e.*, that federal regulation of railroad abandonment preempts state law governing title to real estate. The very essence of the *Preseault* decisions in both the Supreme Court and the Federal Circuit is to the contrary. Under the jurisprudence established by the *Preseault* decision of the Supreme Court, *supra*, and the *Preseault* decision of the Federal Circuit, *supra*, once the ICC grants the NITU, the issue of whether there is abandonment or excessive use *under state law* becomes solely a compensation claim against the United States to be determined in the Court of Federal Claims. The decision of the Eighth Circuit in the instant case is not in conflict with the *Preseault* cases.

The Petitioner's effort in this case, in both the state court and the federal district court, was not so much to determine title as to oust Gateway Trailnet. In its "Second Amended Petition" filed in the District Court (App. 163), it even added a count in ejectment. Under the federal regulatory scheme, as delineated in the two *Preseault* cases, Petitioner is not entitled to ejectment, although it may, under the most recent *Preseault* decision of the Federal Circuit, be entitled to damages from the federal government for a regulatory taking.[7]

Petitioner sets great store for its claim of conflict (Petition for Writ, p. 9) on the sentence of the Eighth Circuit's opinion (Appendix to Petition for Writ, p. 9a) that "state law claims can only be brought *after* the ICC has authorized an abandonment . . . ." [Emphasis the Court's.] This sentence must be read in

7. Or it may not be so entitled. The decision of the Federal Circuit turned principally on the fact that the tracks had been torn up long before the Rails-to-Trails order. Here the tracks were taken up after the transfer to Gateway Trailnet. *See* opinion, Appendix to Petition for Writ, p. 13a.

the light of the Petitioner's pleaded objective of ousting Gateway Trailnet. The sentence does not mean that claims for compensation in the Court of Federal Claims based on property rights under state law as approved in the Supreme Court's decision in *Preseault*, *supra*, or the Eighth Circuit's previous decision in *Glosemeyer*, *supra*, could not be made in a proper case.

The two *Preseault* decisions by the Supreme Court and the Federal Circuit, respectively, make it clear that the regulatory scheme under Title 49 U.S.C. § 10903 and Title 16 U.S.C. § 1247(d) does not affect title under state law but that the effect of extending the life of the easement to provide interim trail use is a regulatory taking for which compensation from the United States is justified. The decision of the Eighth Circuit which Petitioner would now have this Court review is entirely within the framework of the two statutes and the two *Preseault* decisions. The Petition for Writ of Certiorari should be denied.

II.

THERE ARE NO STATE ISSUES TO BE DETERMINED.

Late in its Petition for Writ of Certiorari (pp. 17 and 18), Petitioner complains that if the state case had not been removed to federal court, the Missouri court would have considered the claim that the right-of-way actually occupied only fifteen to twenty feet of the property claimed. As a result of the removal, Petitioner complains, it "has no means of establishing the boundaries of the railroad's right-of-way that has been banked and put to interim use as a trail." This issue comes up too late. The state case pleaded no such issue (Supp. App. 08). Neither did the extensive First Amended Petition filed in the District

Court, which alleged a 100 foot right-of-way (App. 68).[8] Petitioner could have raised the issue before the ICC but did not intervene to do so. The Eighth Circuit correctly ruled that Petitioner's failure to appeal the decision of the ICC to the Court of Appeals forecloses issues which could have been decided by the Commission. There is no issue here demanding consideration by the Supreme Court. There is no question of federal preemption.

Moreover, it is unlikely that the Missouri courts would have taken jurisdiction even if no removal had been filed. In *Kansas City Area Transportation Authority v. Ashley*, 55 S.W. 2d 9 (Mo. *en banc* 1977), the Supreme Court of Missouri refused to take jurisdiction as to the abandonment issue in a case where, although rail service had ended and the tracks been torn up, the ICC still had jurisdiction under 49 U.S.C. § 10903.[9] This is exactly what the Supreme Court of Vermont did in the *Preseault* case. *See Trustees of the Diocese of Vermont v. State of Vermont*, 496 A.2d 151 (Vt. 1985) involving the *Preseault* facts.[10] The preemption question which Petitioner seeks to raise was settled in Missouri law by the Supreme Court of Missouri in 1977.

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8. In fact, Petitioner pleaded repeatedly the existence of a 100 foot right-of-way. The First Amended Petition filed in the District Court attached copies of all the deeds by which Petitioner claims fee ownership. (App. 102-22). Each deed either refers to the plat of Grantwood Terrace, a subdivision, or to the boundary of the 100 foot right-of-way. The plats of Grantwood Terrace all show the MISSOURI PACIFIC 100' RIGHT-OF-WAY. *See* App. 101, 125, and 137.

9. *See also Mobile & Gulf Railroad Co. v. Crocker*, 455 So. 2d 829 (Ala. 1984) where the Alabama Supreme Court held the same way, citing the Missouri decision.

10. It was only after this decision by the Vermont court that the State of Vermont sought and received a rails-to-trails conversion order from the ICC. *See Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 9 (1990).

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit in this case is not in conflict with any opinion of this Court or with the opinion of any other United States court of appeals on the same important matter. Neither does the opinion conflict with any decision of the Supreme Court of Missouri. Nothing in the opinion below calls for the exercise of this Court's supervisory power. The issues in this case have previously been decided conclusively by this Court. No established rule of law has been misapplied. The Petition for Writ of Certiorari therefore should be denied.

Respectfully submitted,

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APPENDIX A — LETTER FROM PRESIDENT GRANT TO C.W. FORD, APRIL 6, 1872

Executive Mansion
Washington, D.C. Apl. 6th 1872

Dear Ford:

I am in receipt of your letter in which you say that Dr. Steinhaur demands large damages from the railroad for running through his place. I am sorry to hear this for I know of no land that will be benefitted more by the road than his. Probably Judge Long might have influence with him. For my own part I proposed as soon as the road was spoken of to give the right-of-way wherever my land was touched, both on the farm and near Carondelet, and to give five acres off the farm for a depot. Since that [sic], at the suggestion of Mr. Hays, I agreed to make the depot grounds twenty acres, but to be sold in lots one half the proceeds to come to me, the other to go to the road. You are at liberty to state this to Mr. Peirce.

Yours Truly

U.S. Grant

The affidavits of Professor John Y. Simon (App. 259) and Mark Cedeck (App. 232) establish the connecting facts about both the addressee of the letter and the Mr. "Hays" and Mr. Peirce whose names are mentioned in it. The addressee, Charles W. Ford, was President Grant's friend and agent in St. Louis. Other letters cited in the affidavit establish that Ford handled a broad range of business and personal matters for Grant in St. Louis during Grant's presidency, including matters concerning Grant's property in Carondelet and his farm in St. Louis County.

Appendix A

Mr. Cedeck's affidavit establishes that Frances B. Hayes and Andrew Peirce, Jr. were, in 1872, directors of the Pacific Railroad Company and colleagues of Joseph Seligman, a noted railroad financier of the day. Grant's letter to Ford mentions a discussion with "Hays"[1] and encourages Ford to discuss Grant's intentions with Peirce. Mr. Cedeck's affidavit further ties Peirce to this particular project by quoting a letter from Seligman to Peirce advising him to route the Carondelet Branch of the Pacific Railroad through Grant's farm in accordance with previous discussions between Seligman and Grant. The railroad was in fact built on this right-of-way in 1872.[2] Apparently the plan for a depot mentioned in Grant's letter never materialized.

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1. The same misspelling of Hayes' name occurs in Poor's *Railroad Manual for 1872-73*, submitted under the Affidavit of Mark Cedeck, at page 568 (App. 258).

2. See statement in *Poor's Manual of the Railroads For 1872-73*, submitted under the Affidavit of Mark Cedeck, at page 565 (App. 255).

APPENDIX B — 49 U.S.C. § 10903

§ 10903 Authorizing abandonment and discontinuance of railroad lines and rail transportation

> (a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may —
>
> (1) abandon any part of its railroad lines; or
>
> (2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural or community development.

> *Note:* Above is the form of § 10903 as it existed when the facts of this case occurred, before it was amended by the ICC Termination Act of 1995. The 1995 act amended § 10903 to read as follows:

§ 10903. Filing and procedure for application to abandon or discontinue

(a)(1) A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to —

> (A) abandon any part of its railroad lines, or

(B) discontinue the operation of all rail transportation over any part of its railroad lines,

must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.